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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FRANK COSTELLO, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD BENNETT WILLIAMS,
AGNES A. NEILL,
1000 Hill Building,
Washington 6, D. C.

MORRIS SHILENSKY,
120 Broadway,
New York 5, New York,
Counsel for Petitioner.

HAYS, ST. JOHN, ABRAMSON & HEILBRON,
120 Broadway,
New York 5, New York,
Of Counsel.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the order of the United States District Court for the Southern District of New York, which denied his motion for a new trial.

OPINIONS BELOW

The opinion of the District Court is reported at 157 F. Supp. 461 (R. 781a-802a). The opinion of the Court of Appeals has not yet been reported (App. 2a).

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1958 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the prosecution may classify prospective jurors on the basis of information derived from their federal income tax returns and use such classification as a basis for exercising its peremptory challenges.

2. Whether a defendant is lacking in "due diligence" when he fails to investigate the possibility that federal officers used state wiretaps to secure evidence against him.

3. Whether 18 U.S.C. §§ 1701-1703 bar the use of evidence derived from a mail cover.

STATUTES INVOLVED

Internal Revenue Code of 1939, Regulations § 463C.34:

> "Sec. 463C.34 Inspection by Government Attorneys.—Any return shall be open to inspection by a United States attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. The request for inspection shall be in writing and, except as provided in section 463C.37, shall be addressed to the Commissioner, and shall state the purpose for which inspection is desired. It may be signed by the Attorney General, the Assistant to the Attorney General, an Assistant Attorney General, or a United States attorney."

Internal Revenue Code of 1939, Regulations § 463D.4:

> "Sec. 463D.4 Use of returns in litigation.—The return of an individual, partnership, corporation,

or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. If a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity necessarily results from such use. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished if the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto."

47 U.S.C. § 605:

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in re-

sponse to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

18 U.S.C. § 1701:

"Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined not more than $100 or imprisoned not more than six months, or both."

18 U.S.C. § 1702:

"Whoever takes any letter, postal card, or package out of any post office or any authorized de-

pository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1703:

"(a) Whoever, being a postmaster or Postal Service employee, unlawfully detains, delays, or opens any letter, postal card, package, bag, or mail intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier or other employee of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General; or secretes, or destroys any such letter, postal card, package, bag, or mail, shall be fined not more than $500 or imprisoned not more than five years, or both.

"(b) Whoever, being a postmaster or Postal Service employee, improperly detains, delays, or destroys any newspaper, or permits any other person to detain, delay, or destroy the same, or opens, or permits any other person to open, any mail or package of newspapers not directed to the office where he is employed; or

"Whoever, without authority, opens, or destroys any mail or package of newspapers not directed to him, shall be fined not more than $100 or imprisoned not more than one year or both."

STATEMENT

On March 11, 1953, a four count indictment was returned against petitioner in the United States District Court for the Southern District of New York. The indictment charged petitioner with understating his net income for 1946, 1947, 1948, and 1949, in violation of § 145 (b) of the Internal Revenue Code of 1939. The jury acquitted him under the first count and convicted under the remaining three counts. On May 17, 1954, he was given concurrent five-year sentences and fined $10,000 under each of these three counts.

Petitioner then appealed to the Court of Appeals, which reversed as to count two but affirmed as to counts three and four. 221 F. 2d 668. This Court granted certiorari and affirmed, limiting its review to the validity of an indictment based upon hearsay evidence. 350 U.S. 359.

On November 28, 1956, appellant filed a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure (R. 16a-22a).[1] An affidavit annexed to this motion alleged that petitioner retained his present counsel in June of 1956 to defend him in a denaturalization case, that counsel discovered the extensive use of wiretap evidence by the government in connection with that case, and that the denatural-

[1] On May 15, 1956, petitioner filed a motion in the District Court for correction of his sentence under Rule 35 of the Federal Rules of Criminal Procedure and 28 U.S.C. § 2255 (R. 10a). This motion was denied by the District Court and the Court of Appeals affirmed. 239 F. 2d 177. Subsequently this Court granted certiorari and affirmed on June 3, 1957. 353 U.S. 978. Petitioner's motion for a new trial was held in abeyance pending final disposition of the motion to correct his sentence.

ization proceedings were accordingly dismissed on October 23, 1956.[2] The affidavit went on to allege that as a result of his preparation for trial in the denaturalization case, petitioner's counsel began to suspect that state officers had conducted considerably more extensive tapping of petitioner's telephone than available records indicated and that information so obtained could have been useful to the United States in its tax case against petitioner. After further investigation at petitioner's request, counsel filed the present motion for a new trial.

A hearing was held on this motion before Judge McGohey. Petitioner introduced transcriptions of two hundred and forty-two conversations intercepted by state officers. It was conceded that thirty-eight witnesses in the original prosecution were participants in or were mentioned in the intercepted conversations and that these witnesses testified to expenditures totaling $152,797.[3] Petitioner produced uncontradicted evidence that the New York District Attorney's office had made the transcriptions of these conversations available to the Bureau of Internal Revenue as "a continuing thing," "a continuing situation" (R. 142a-143a).

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[2] The opinion of the District Court in the denaturalization case is reported at 145 F. Supp. 892. The Court of Appeals reversed. 247 F. 2d 384. This Court granted certiorari and reversed the Court of Appeals. No. 494, Oct. Term, 1957.

[3] This figure differs slightly from the figure contained in the trial court's opinion. Judge McGohey found that the total amount paid to recipients mentioned in the intercepted conversations was $155,000, in round numbers. As petitioner advised the court below, this discrepancy apparently resulted from the fact that one of the witnesses gave the court his notes, which contained information concerning three expenditures, totaling $2,075.26, as to which no evidence was offered. The discrepancy, however, is obviously insignificant.

Petitioner also produced uncontradicted evidence that synopses of the intercepted conversations were made available to the Assistant United States Attorneys who tried the original prosecution (R. 420a). Petitioner and both of the attorneys who represented him in the original prosecution testified that they had no knowledge of access to state wiretaps by federal agents until petitioner's present counsel discovered such access in the course of preparing to defend the denaturalization case (R. 652a, 655a, 700a).

Judge McGohey permitted petitioner to amend his motion by alleging that the government employed a "mail watch" to secure evidence in the original prosecution (R. 23a-24a). The testimony showed that employees of the Post Office Department, at the request of the Bureau of Internal Revenue, turned petitioner's mail over to a supervisor, who recorded the names and addresses of the senders and then returned it to the carrier for delivery. The testimony was in conflict as to whether delivery was delayed, and the trial court found as a fact that "while not inevitable, some delay was probable" as a result of the watch (R. 796a). An agent of the Bureau of Internal Revenue testified that the watch was "fruitful" and that he found expenditures by petitioner as a result thereof (R. 264a). Ten witnesses who testified to expenditures totaling $16,872 were named in the mail watch records. Concededly neither petitioner nor any of his attorneys had any reason to suspect that there had been a mail watch at the time of the original trial.

Judge McGohey also permitted petitioner to amend his motion by alleging that the income tax returns of prospective jurors were inspected by the government prior to trial (R. 25a-26a). The evidence showed that

an Internal Revenue agent was ordered to inspect the 1952 returns of the whole jury panel (R. 303a-306a).[4] Information derived from his inspection was transmitted to the Assistant United States Attorneys in charge of petitioner's prosecution, who used it in classifying the members of the panel into four groups designated by the numbers 1, 2, 3, and 4 (R. 546a-548a, 579a-589a). The testimony was that the "lower the number, the more favorable the panel member . . . to the government" (R. 547a). The chief prosecutor used the classification numbers in exercising his peremptory challenges at trial (R. 577a).

Eight of the jurors who ultimately sat were in class 1, two were in class 2, and two were in class 3. Two alternate jurors were in class 1 and one was in class 2. The prosecution exercised two peremptory challenges against jurors in class 2 and three against jurors in class 3. No peremptory challenges were exercised against jurors in class 1 (R. 693a-694a). Concededly neither petitioner nor any of his attorneys had any reason to suspect that any juror's tax return had been inspected until a revenue agent who was testifying at the hearing inadvertently revealed the fact.

At the conclusion of petitioner's evidence, the government moved to "dismiss" his motion (R. 723a). It advised the court that it did not wish to proceed with its proof until this matter had been decided. Judge McGohey took the case under advisement and subsequently handed down an opinion denying petitioner's motion.

The court found that petitioner's allegations on the subjects of wiretapping and interference with his mail

[4] The panel contained 360 names, but the agent indicated that he was able to locate only about 150 returns (R. 304a, 591a).

were supported by the evidence. He concluded, however, that "in light of the Court of Appeals' analysis of the expenditures proved at the trial," there was sufficient untainted evidence to sustain petitioner's conviction under counts three and four. He suggested, moreover, that petitioner knew his conversations were being intercepted prior to trial. He further stated that a mail watch was not prohibited by federal law.

Judge McGohey found that an agent of the Bureau of Internal Revenue had in fact inspected the 1952 income tax returns of the prospective jurors and that the prosecution had classified the jurors in order of preference on the basis of this information, using the classification in connection with its peremptory challenges. The court refused to hold that this practice violated petitioner's rights.

Petitioner thereupon appealed to the Court of Appeals, which affirmed the judgment of the court below. The Court of Appeals held that petitioner did not exercise due diligence to ascertain and exclude evidence obtained by wiretaps, and hence found it unnecessary to consider whether there was in fact sufficient untainted evidence to sustain conviction. The court conceded that petitioner and his attorneys had denied any knowledge of federal access to state wiretapping prior to trial and that these denials were uncontradicted in the record. It held, however, that petitioner had the burden of demonstrating due diligence in discovering the use of wiretap evidence, and that petitioner's knowledge of state wiretapping in 1943 required him to investigate whether federal officers had used state wiretapping to secure evidence against him. On the mail watch issue, the court concluded that there was

no violation of any federal statute and hence that the evidence was properly admitted.

The court went on to state that the tax return point "raises a question of first impression." It decided that inspection of the prospective jurors' returns was permitted by applicable regulations. It further stated that "this court may not assume to proscribe a practice of the United States attorney's office which violates no statute and no rule which the Supreme Court has made in the exercise of its supervisory power over administration in the lower federal courts."

REASONS FOR GRANTING THE WRIT

The court below virtually requested this Court to grant certiorari to review the legality of inspecting prospective jurors' income tax returns. As the court below recognized, this is a question of first impression which calls for the exercise of this Court's supervisory power over the administration of justice in the lower federal courts.

In holding that petitioner failed to exercise "due diligence" because he failed to suspect that the United States Attorney would commit a crime by securing and using state wiretaps, the court below has formulated a radically unsound standard for the granting of new trials. The admissibility of evidence secured through a mail cover presents a third important question of federal criminal procedure which requires review by this Court.

1. The legality of inspecting prospective jurors' income tax returns has never before been passed upon by the federal courts. Petitioner contends that this practice presents serious questions of statutory construction and judicial administration.

Sec. 55(f) of the Internal Revenue Code of 1939, now Secs. 6103 and 7213(a) of the 1954 Code, provided that income tax returns constitute public records, but it further provided that such returns should be open to inspection only upon order of the President or under rules and regulations promulgated by the President. This section went on to make the unauthorized divulgence or examination of returns a misdemeanor.

Sec. 463C.34 of the 1939 regulations, which is still in effect and applicable to the 1954 Code, provides that any return shall be open to inspection by a United States Attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. It further requires that the request for inspection shall be in writing and shall be signed by designated officials. Cases where the actual return is furnished for use in litigation are governed by Sec. 463D.4 of the regulations, likewise still in effect, which provides that returns may be furnished to a United States Attorney for use in preparation for litigation, or to an attorney in the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General.

The court below has interpreted these regulations to permit wholesale inspection of prospective jurors' returns without any written authorization. Its decision constitutes a *carte blanche* for inspecting the returns of all jurors, witnesses, and litigants in every case, whether civil or criminal, to which the government is a party. In view of the established policy providing for the confidentiality of income tax returns, this interpretation of the regulations requires review by this Court.

Regardless of whether the regulations purport to permit this practice, moreover, there is an important question of judicial administration. The court below has inaugurated a system of trial by "class 1" jurors, classified as such on the basis of information unavailable to the private citizen. The record reveals and the court below found that the government has engaged in this practice in other cases (R. 722a-723a). Even if the jurors in this case may have been unaware that their financial affairs were under scrutiny by the prosecution, future jurors will know of the practice and must inevitably be influenced by it. The representative character of jury panels will be affected by the reluctance of many citizens to serve under these conditions. It is naive to suggest that the honest taxpayer will welcome inspection of his return by federal prosecutors.

Any question which thus touches upon the integrity of the jury process is a question of grave importance. Where the jury is illegally selected, a resultant conviction cannot stand. Cf. *Eubanka* v. *Louisiana*, No. 550, Oct. Term, 1957. If the government had tapped the wires of prospective jurors or searched their houses without warrants to secure information for use in conducting its voir dire and exercising its challenges, like considerations should invalidate a resultant conviction. The applicability of these principles to the facts of the case at bar should be settled by this Court.

Indeed, the court below expressly disclaimed capacity to resolve the question, stating:

> "However that may be, we will not attempt to make a policy-determination as to the propriety of the practice by weighing its aid to law enforcement against its limited curtailment of the privacy of tax returns. For we think this court may not

assume to proscribe a practice of the United States attorney's office which violates no statute and no rule which the Supreme Court has made in the exercise of its supervisory power over administration in the lower federal courts. Cf. *McNabb* v. *United States*, 318 U.S. 332."

2. The court below has passed upon a second significant question in the field of federal criminal procedure in ruling that petitioner failed to exercise "due diligence" in discovering the use of wiretap evidence. Admittedly he knew that state officers tapped his wire in 1943. The trial court held that he had reason to suspect continuing state interceptions thereafter. The record is absolutely barren, however, of any evidence that petitioner or his counsel had the slightest reason to suspect the federal government of obtaining and using these state interceptions.[5] Moreover, no discovery procedure was available to petitioner whereby he could have questioned the United States Attorney or the Bureau of Internal Revenue to ascertain the extent of cooperation between state and federal authorities. It is apparent that such cooperation would never have been discovered if the government had not also used state interceptions in the denaturalization case.[6]

In holding that petitioner's motion is barred for want of due diligence, the court below actually decided two important questions of interpretation under Rule 33 of the Federal Rules of Criminal Procedure. It held that a defendant must show due diligence when he moves for a new trial on the ground of a fundamental

[5] Cf. *United States* v. *Johnson*, 327 U.S. 106, 111-112, permitting review of a "finding of fact" under these circumstances.

[6] Cf. *Coplon* v. *United States*, 191 F. 2d 749, certiorari denied, 342 U.S. 926.

infirmity in the prosecution's proof, and it held that due diligence requires a defendant to anticipate that the prosecution will commit a crime in order to secure a conviction.

As recognized by the Court of Appeals, there are two general rules governing new trials on the ground of newly discovered evidence. Where the newly discovered evidence constitutes new affirmative proof on some issue, the defendant must show as follows: (a) the evidence must in fact be newly discovered, (b) facts must be alleged in the motion from which the court can infer due diligence by the movant, (c) the new evidence must be neither merely impeaching nor cumulative, (d) it must be material, and (e) it must be of such character that in the new trial it would probably produce an acquittal. *United States* v. *Hiss*, 107 F. Supp. 128, 136, affirmed, 201 F. 2d 372, certiorari denied, 345 U.S. 942; *Berry* v. *State of Georgia*, 10 Ga. 511, 527.

Where, on the other hand, the newly discovered evidence shows a fundamental infirmity in the prosecution's proof, as for example in a case of recantation or perjury, the criteria have been somewhat differently characterized: (a) the court must be reasonably well satisfied that a material witness testified falsely, (b) without such testimony, the jury might have reached a different conclusion, and (c) the defendant was either surprised by and unable to meet the testimony or did not know it was false until after the trial. *Larrison* v. *United States*, 24 F. 2d 82, 87-88.

In importing the due diligence requirement of the *Berry* rule into the *Larrison* rule, the court below has decided an important question of interpretation under

Rule 33. This Court has never held that a new trial must be denied because the defendant, although unaware that the evidence against him was tainted, might have discovered the taint by diligent investigation. In *Mesarosh* v. *United States*, 352 U.S. 1, for example, it was never suggested that a new trial should be denied because petitioners might have discovered the unreliable character of the prosecution's testimony by diligent investigation.[7] It should be enough that the conviction was in fact the fruit of tainted proof and that the defendant did not in fact discover the taint until after the trial.

Moreover, the court below went on to hold that due diligence requires a defendant to anticipate that the government will become a law breaker in order to enforce the law. In spite of the fact that the Court of Appeals itself regarded the government's evidence as lawful until the decision of this Court in *Benanti* v. *United States*, 355 U.S. 96, it held that petitioner was deficient in diligence because he failed to divine that the Court of Appeals was wrong and to investigate the possibility that the prosecution might be committing a crime. Petitioner does not suggest that he could have kept silent had he known that the prosecution was offering evidence derived from state wiretapping; but whether he was required to ascertain the existence of such lawless law enforcement presents a serious problem.

The holding of the court below represents a novel and harsh construction of Rule 33, a construction at

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[7] Cf. 352 U.S. at 13, footnote 8, indicating that petitioners were fully aware of Mazzei's testimony before the Senate Permanent Subcommittee on Investigations and could have filed a timely motion for a new trial on the basis thereof.

war with the principles behind the *Mesarosh* decision. The criteria which should control the granting of new trials on the ground of a newly discovered infirmity in the prosecution's proof require definition by this Court.

3. The admissibility of evidence obtained by means of a mail watch has never before been passed upon by a federal appellate court. The trial court found as a fact that delivery of petitioner's mail had been delayed for the purpose of recording the names and addresses of the senders. Concededly the legality of such detention is governed by 18 U.S.C. §§ 1701-1703.

Petitioner contends that such detention constitutes retarding the passage of the mail, which is a misdemeanor under § 1701. It likewise constitutes taking mail matter "with design . . . to pry into the business or secrets of another," which is a felony under § 1702. Finally, it constitutes detaining or delaying the mails, which is a felony under § 1703 if done by employees of the postal service.

Petitioner's position is supported by S. Rept. 2510, 83d Cong., 2d sess., which is reprinted in full at 101 Cong. Rec. 2564. The special committee which returned this report was created by S. Res. 332, 83d Cong., 2d sess., to investigate charges that a mail cover had been placed upon the incoming correspondence of a member of the Senate. The committee condemned the use of mail covers in strong language and suggested criminal prosecution under §§ 1701-1703. Subsequent to the issuance of this report, the Post Office Department amended its regulations to prohibit all mail covers save those to aid in the apprehension of fugitives. Postal Laws and Regulations, 1948 ed., § 41.4; 1956

Postal Manual, §§ 311.1, 311.6, 311.7. See also *Oliver* v. *United States*, 239 F. 2d 818, petition for certiorari dismissed, 352 U.S. 952; *United States* v. *Coplon*, 88 F. Supp. 921, 931.

In holding that the introduction of evidence derived from a mail cover does not entitle petitioner to a new trial, the court below decided a most important question of federal criminal procedure which should be resolved by this Court. It is settled that evidence obtained by federal officers in violation of federal law cannot be used against the victim of their unlawful conduct. If mail covers are prohibited by §§ 1701-1703, evidence obtained thereby is concededly inadmissible. The obvious utility of this investigative device in net worth tax cases, as well as in numerous other types of prosecutions, guarantees that the issue of its legality will recur with increasing frequency until this Court decides the point.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

EDWARD BENNETT WILLIAMS,
MORRIS SHILENSKY,
AGNES A. NEILL,
Counsel for Petitioner.

June, 1958.